JUSTICE AND IMPLACABLE HOSTILITY TO CONTACT: PARENTAL BELIEFS, FACTUAL FOUNDATION AND JUSTIFICATION

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I. Introduction

This article explores the issue of fact-finding in cases in which one parent, post-separation, is implacably opposed to the other parent's contact with a child. In this context, the notion of the "implacably hostile parent" has a significant gender dimension,[1] with debate mostly focusing on the "implacably hostile *mother*", the child's mother being most often the resident parent post-separation. The portrayal of mothers, often by fathers' rights organisations, as commonly selfishly and stubbornly resisting child/parent contact, is highly contested.[2] While there are certainly instances of such behaviour in case law,[3] there is also research evidence that in many cases resident parents have genuine and serious concerns about the appropriateness of a parent's contact[4] and that the number of cases of unfounded hostility to contact is comparatively small.[5] There has been concern that the courts' strong pro-contact stance may in some cases downplay the significance of genuine risks to children and resident parents,[6] and that the issue between the parties is then erroneously reconstructed as the mother's unreasonable and invincible opposition.[7]

Fact-finding is an important component of justice to the parent on either side of such disputes. It is essential to ensure, for example, that a mother who has genuine fears is not erroneously labelled as unjustifiably hostile to contact; or that a father's contact is not erroneously characterised as harmful in cases of unjustifiable hostility. The role of fact-finding in ensuring justice is of crucial importance in children cases because, at the stage of considering the child's welfare, the court must treat the child's welfare as its paramount

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[1] L. Trinder, "Dangerous Dads and Malicious Mothers: The Relevance of Gender to Contact Disputes" in M. Maclean (ed.), *Parenting After Partnering – Containing Conflict after Separation* (Oxford: Hart, 2007) pp. 81-94.

[2] R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart, 2006) particularly at pp. 64-65, and S. Boyd, "Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes" (2004) 6(1) *Journal of the Association for Research on Mothering* 52-74.

[3] See, e.g., *Re J (A Child - Intractable Contact)* [2017] EWFC B103; *Re A (Intractable Contact Dispute: Human Rights Violations)* [2013] EWCA Civ 1104; [2014] 1 F.L.R. 1185; *Warwickshire County Council v TE & Others* [2010] EWHC B19; *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam); [2004] 1 F.L.R. 1226.

[4] For an overview of the problem of domestic abuse, e.g., see R. Hunter, A. Barnett and F. Kaganas, "Introduction: contact and domestic abuse" (2018) 4 *Journal of Social Welfare and Family Law* 401-425.

[5] L. Trinder, A. MacLeod, J. Pearce, and H. Woodward, "Enforcing Child Contact Orders: Are the Family Courts Getting it Right?" [2013] *Family Law* 1145. See per Dame Elizabeth Butler-Sloss P. in *Re H (a child) (contact: mother's opposition)* [2001] 1 F.C.R. 59, at 63: "there is a small but enormously difficult group of cases where the mother refuses contact and there are great difficulties firstly over the arrangements and secondly over the enforcement of contact."

[6] R. Bailey-Harris, J. Barron, and J. Pearce, "From utility to rights? The presumption of contact in practice" (1999) 13(2) *International Journal of Law, Policy and the Family* 111–131; A. Perry and B. Rainey, "Supervised, Supported and Indirect Contact Orders: Research Findings" (2007) 21(1) *International Journal of Law, Policy and the Family* 21–47.

[7] A. Barnett, "Contact at all costs? Domestic violence and children's welfare" (2014) 26 *Child and Family Law Quarterly* 439–462; H. Rhoades, "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 *International Journal of Law, Policy and the Family* 71-94.

consideration[8] and the interests of others cannot at that point be considered independently of their impact upon child welfare.

Yet the opportunities for appellate scrutiny of, and guidance on, fact-finding in children cases are limited. In most cases, other than appeals from a fact-finding hearing, an appellate court accepts the admissions or facts as found by the judge. The focus is thus often merely on scrutinising whether the various matters identified by the judge as bearing upon child welfare have been weighed appropriately, as opposed to examining the judge's reasoning which led to findings of fact. A rare opportunity for the Court of Appeal to stress the importance of fact-finding in a case in which parents, post-separation, are bitterly contesting the non-resident parent's contact with the child(ren), arose in *Re J (children) (contact orders: procedure)*.[9] This case was unusual in that the complete failure to make findings of fact on the issues between parents attracted the Court of Appeal's attention. The mother made several allegations against the father of violent and aggressive behaviour, including "marital rape", and claimed that the children had been traumatised, for which reasons she and the children opposed contact with the father. By contrast the father claimed that he was a victim of the mother's false allegations and unjustified poisoning of the children's minds. By dint of several procedural failings, the judge was faced with a case in which, late in its lengthy process, no findings of fact had been made. In the circumstances, the judge opined that it was not necessary to make adverse findings against the father since he was convinced that the mother's objection to contact was genuine, based upon the children's trenchant objections to contact, as evidenced by their statements in court documents. The Court of Appeal allowed the father's appeal against the judge's order limiting his contact. As McFarlane L.J. explained:

> "In this case, as the court had failed to determine the underlying facts, it was not, in reality, in any informed position to decide what of the range of options that might be available would best meet the needs of the children. If, taking the father's case at its highest, this mother had cynically and without justification poisoned the minds of her children so that they were now so wholly opposed to their father, then leaving them in her care with no prospect of future contact to him is unlikely to be in their long-term interests. If, on the contrary, the mother's case on the facts was sound, an order for limited or no contact might have been justified given the trenchant views and the ages of the children."[10]

As well as underlining the importance of fact-finding, *Re J* highlights features of child law decision-making which are sometimes in tension, particularly in intractable contact cases, and which are the focus of this article: on the one hand, the requirement that an inference as to risk of harm to a child have a factual foundation; and on the other, the courts' acceptance that a parent's genuine (yet not necessarily rational) belief may be a relevant factor in so far as it bears upon the welfare of the child. The tension between fact and belief is at its starkest when a parent's genuinely held erroneous belief conflicts with the court's findings of fact relating to the belief. A striking example is when a court has found that a father has not sexually abused his child, but the child's mother (still) genuinely believes he has. Yet, because of the appellate court's limited engagement with fact-finding, the issue of the factual underpinning of a parent's belief or attitude, and how tensions between fact and belief and their impact on child welfare are to be negotiated in a principled fashion, have remained largely unexplored by the courts in England and Wales. Moreover, while in recent years there has been much

[8] Children Act 1989, s. 1(1).
[9] [2018] EWCA Civ 115; [2018] 2 F.L.R. 998.
[10] *Re J (children) (contact orders: procedure)* [2018] 2 F.L.R. 998 at [92].

emphasis procedurally on fact-finding in cases of alleged domestic abuse,[11] albeit not without difficulties in practice,[12] little attention (if any) has been paid to the need for careful fact-finding in relation to parental belief or attitude as a justification for denying child/parent contact. With the much broader and abstract canvas available to the academic observer, however, this article explores how rules relating to the drawing of inferences as to risk of harm to a child should apply in cases in which parental belief or implacable hostility to contact is claimed as a justification for denying or restricting the other parent's contact with a child.[13]

The article begins by outlining the English courts' approach to cases involving parental hostility to contact; and explaining the courts' approach to fact-finding and drawing of inferences as to risk of harm to a child in private law children cases. It then sets out the reasoning in the few cases which have engaged with the latter issue in the context of parent/child contact and demonstrates that the cases are not easy to navigate and to reconcile. The article therefore analyses the various types of case in which parental hostility might arise and examines how the requirement that there be a factual foundation for an inference of risk of harm applies in such instances. The analysis highlights the difficulties that may be encountered in establishing such factual foundation in some cases and criticises how the courts characterise cases in which hostility is not justified.

II. Parental Hostility To Contact: The Courts' Approach

It was accepted in *Re B (A Minor) (Access)*[14] and is now considered "well settled"[15] that a parent's attitude to contact (termed by Latey J. "implacable hostility"[16]) can constitute an exception to the courts' general principle that a child should grow up in the knowledge of both parents, where "to enforce, impose or seek to enforce or seek to impose access is going to have adverse effects on the child and injure it".[17] It has been acknowledged, therefore, that in some cases "the welfare of the child requires the court to inflict injustice upon a parent with whom the child is not resident".[18]

In *Re D (A Minor) (Contact: Mother's Hostility)*,[19] Waite L.J. held that a judge had not fallen into error in denying a father contact with his child where the mother's attitude towards contact placed a child at "serious risk of major emotional harm if she were to be

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[11] Family Procedure Rules 2010, Practice Direction 12J.

[12] A. Barnett, "'Like gold dust these days': Domestic violence fact-finding hearings in child contact cases" (2015) 23 *Feminist Legal Studies* 47–78.

[13] The problem is not unique to English law. For the Australian approach to implacable hostility, see *Russell and Close* (unreported, Full Court of the Family Court, 25 June 1993), as approved in *A v A* [1998] FamCA 25; 146 F.L.R. 188. On fact-finding and risk, see *M v M* [1988] H.C.A. 68; (1988) 166 C.L.R. 69 and for critique P. Parkinson, "Child Sexual Abuse Allegations in the Family Court" (1990) 4 *Australian Journal of Family Law* 60 and L. Young, S. Dhillon and L. Groves, "Child sexual abuse allegations and s 60CC(2A): A new era?" (2014) 28 *Australian Journal of Family Law* 233. For New Zealand case law examples see *CSM v DRM* [2012] N.Z.F.C. 10117; *GEH v AJH* [2013] N.Z.F.C. 889; *M v H* [1999] N.Z.F.L.R. 439; *SPB v SLB [Contact]* [2010] N.Z.F.L.R. 958. For Canadian cases see N. Bala, S. Hunt and C. McCarney, "Parental Alienation: Canadian Court Cases 1989–2008" (2010) 48(1) *Family Court Review* 164-179; N. Bala and K. Hunter, *Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases* (Queen's University, Canada, Research Paper, May 2015).

[14] [1984] F.L.R. 648, CA.

[15] *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 F.L.R. 1, CA, at 7; [1993] 1 F.C.R. 964, at 972.

[16] *Re B (A Minor) (Access)* [1984] F.L.R. 648 at 649.

[17] [1984] F.L.R. 648 at 649, and for a similar view *Re BC (A Minor) (Access)* [1985] F.L.R. 639, CA.

[18] *Re J (A Minor) (Contact)* [1994] 1 F.L.R. 729, CA at 736.

[19] [1993] 2 F.L.R. 1.

compelled to accept a degree of contact to the natural father against her will."[20] Drawing attention to the words "serious risk of major emotional harm", Sir Thomas Bingham M.R. in *Re O (Contact: Imposition of Conditions)* opined that when judging whether contact will injure a child the court should "take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems."[21] In a review of the authorities in *Re D (Contact: Reasons for Refusal),*[22] Hale J. (sitting in the Court of Appeal) translated Waite L.J.'s description of the judge's finding in *Re D (A Minor) (Contact: Mother's Hostility)* into a prescription, holding that "the court will be very slow indeed to reach the conclusion that contact will be harmful to the child. It may eventually have to reach that conclusion but it will want to be satisfied that there is indeed a serious risk of major emotional harm before doing so."[23] Her ladyship was clear that she was here referring to cases in which "no good reason can be discerned either for the hostility or for the opposition to contact"[24] (hereafter cases of unfounded or unjustified hostility). Hale J pointed out that it is rather different "where the judge or the court finds that the mother's fears, not only for herself but also for the child, are genuine and rationally held".[25] The courts have also subsequently acknowledged a difference where the parent's fears are genuine but not rationally held.[26] As Wilson J. observed in *Re P (Contact: Discretion),*[27] where a parent advances grounds for hostility to contact "which the court regards as sufficiently potent to displace the presumption that contact is in the child's interests" the "hostility as such becomes largely irrelevant: what are relevant are its underlying grounds, which the court adopts." Wilson J. noted a third situation in which the parent "advances sound arguments for the displacement of the presumption but where there are also sound arguments which run the other way". In such a situation, the "hostility to contact can of itself be of importance, occasionally of determinative importance, provided, as always, that what is measured is its effect upon the child." In each case the impact on the child of the resident parent's implacable hostility will need to be weighed against the medium or long-term benefits to the child of contact with the non-resident parent. The conclusion may not always be that the child's overall welfare will not be promoted by contact,[28] but in some cases the impact of the hostility may be determinative.[29]

The courts have been clear, however, that hostility should never of itself be a reason for not ordering contact and it would be an abdication of judicial responsibility to decline to make a child arrangements order for contact simply on the basis that a parent would not obey it.[30] As Sir Thomas Bingham M.R. put it in *Re O (Contact: Imposition of Conditions),*[31] neither parent "should be encouraged or permitted to think that the more intransigent, the

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[20] [1993] 2 F.L.R. 1.
[21] [1995] 2 F.L.R. 124, CA; [1995] Fam. Law 541. For comment, see S. Jolly, "Implacable Hostility, Contact, and the Limits of Law" (1995) 7 *Child and Family Law Quarterly* 228.
[22] [1997] 2 F.L.R. 48, CA; [1998] 1 F.C.R. 321.
[23] *Re D (Contact: Reasons for Refusal)* [1997] 2 F.L.R. 48 at 53. This narrowed the scope of implacable hostility from simply injury to the child's welfare, as set out in the earlier case law.
[24] [1997] 2 F.L.R. 48 at 53. See also *Re B (A Child)* [2016] EWCA Civ 1088, at [10]: defining implacable hostility as involving an objection to contact which is usually irrational and for poor motives.
[25] *Re D (Contact: Reasons for Refusal)* [1997] 2 F.L.R. 48 at 53. For similar categorisation, see Wilson J in *Re P (Contact: Discretion)* [1998] 2 F.L.R. 696; [1999] 1 F.C.R. 566; and for examples, see *Re K (Contact: Mother's Anxiety)* [1999] 2 F.L.R. 703; [1999] Fam. Law 527; *Re J (Refusal of Contact)* [2012] EWCA Civ 720, [2013] 2 F.L.R. 1042.
[26] See e.g., *Re L (Contact: Genuine Fear)* [2002] 1 F.L.R. 621 at [42].
[27] [1998] 2 F.L.R. 696 at 703-704.
[28] See e.g., *Re E (A Minor: Access)* [1987] 1 F.L.R. 368; [1987] Fam. Law 90.
[29] See e.g., *Re J (A Minor) (Contact)* [1994] 1 F.L.R. 729; [1994] 2 F.C.R. 741.
[30] *Re W (A Minor) (Contact*) [1994] 2 F.L.R. 441; [1994] 2 F.C.R. 1216.
[31] [1995] 2 F.L.R. 124.

more unreasonable, the more obdurate and more unco-operative they are, the more likely they are to get their own way."[32] The courts thus view hostility to contact as "a very unattractive argument to place before a court".[33] They will also not "presume problems between parents over contact unless and until they become apparent".[34] As implied by this dictum and Hale J.'s reference to the court needing to be satisfied of harm to the child, there must be more than mere speculation about the impact of hostility on the child's welfare; rather there must be some evidence of the parental hostility and that it is likely to result in major emotional harm if contact be ordered.

These implacable hostility cases are, like all other children cases, subject to the courts' general approach to proof of facts and the drawing of inferences as to harm therefrom. This approach is outlined in the next section and followed by an account of the very few appellate cases which have so far engaged with issues of fact-finding in cases in which parents' beliefs concerning contact are in conflict.

III. Factual Underpinning of an Inference as To Risk of Harm

"*Facts alone are wanted in life. Plant nothing else, and root out everything else" (*Charles Dickens, *Hard Times,* 1854)

Whenever a court is considering an application for a child arrangements order under s. 8 of the Children Act 1989, it must apply the child's welfare as its paramount consideration[35] and, in any contested application, must have regard in particular to matters set out in a checklist in s. 1(3).[36] In *Re M and R (minors) (sexual abuse: expert evidence)*[37] the Court of Appeal was concerned with the interpretation of s. 1(3)(e), which enjoins the court to consider "any harm which [the child] has suffered or is at risk of suffering". Drawing on the House of Lords' interpretation of the requirements for proof of "likely harm" within the meaning of s. 31(2) of the Children Act 1989 in *In re H and others (Minors) (Sexual Abuse: Standard of Proof)*,[38] the Court concluded that risk of harm within s. 1(3)(e) means a real possibility of future harm,[39] and that such risk must be founded upon facts proved to the court's satisfaction on the balance of probabilities as opposed to on the basis of suspicion(s)[40] (hereafter "the rule in *Re M and R*"). The Court could find nothing in the Children Act 1989 to suggest that Parliament intended that all-important decisions as to a child's future should be decided on the basis of suspicion which "would be a recipe for making decisions which were not in the best interests of the child."[41] Nor could the Court find any suggestion that Parliament intended to create a fundamental difference between public and private law cases, commenting:

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[32] [1995] 2 F.L.R. 124 at 129-130.
[33] *Re H (A Minor) (Contact)* [1994] 2 F.L.R. 776 at 783; [1994] 2 F.C.R. 419 at 427.
[34] [1994] 2 F.L.R. 776 at 782.
[35] Children Act 1989, s. 1(1).
[36] Children Act 1989, s. 1(4).
[37] [1996] 4 All E.R. 239; [1996] 2 F.L.R. 195.
[38] [1996] A.C. 563; [1996] 1 All E.R. 1.
[39] *Re M and R (minors) (sexual abuse: expert evidence)* [1996] 4 All E.R. 239 at 248.
[40] The approach adopted in *In re H* is not uncontroversial. For comment, see M. Hayes, "Reconciling Protection for Children with Justice for Parents" (1997) 17 *Legal Studies* 1; C. Keenan, "Finding that a Child is at Risk from Sexual Abuse: *Re H (Minors) (Sexual Abuse: Standard of Proof*" (1997) 60 M.L.R. 857; H. Keating, "Shifting Standards in the House of Lords—*Re H and Others (Minors) (Sexual Abuse: Standard of Proof)*" (1996) 8 *Child and Family Law Quarterly* 157.
[41] *Re M and R (minors) (sexual abuse: expert evidence)* [1996] 4 All E.R. 239 at 247.

> "for whereas the local authority would have to surmount the threshold stage by proving matters on a preponderance of probabilities, one parent seeking, for example, permanently to exclude the other parent from any relationship, such as contact, with the child, would only have to establish possibilities rather than probabilities."[42]

In *In re H*, the House of Lords' opinion on which this Court of Appeal decision was based, was an unusual case on its facts in that the alleged likely harm to the children was premised solely upon whether an older sibling had been sexually abused in the past. There is, however, no general requirement of proof of past harm in order for an inference as to risk of future harm to be made. As Lord Nicholls of Birkenhead observed in *In re H*:

> "There will be cases where, although the alleged maltreatment itself is not proved, the evidence does establish a combination of profoundly worrying features affecting the care of the child within the family. In such cases it would be open to a court in appropriate circumstances to find that, although not satisfied the child is yet suffering significant harm, on the basis of such facts as are proved there is a likelihood that he will do so in the future."[43]

The reasoning in *In Re H* has been endorsed by the House of Lords/Supreme Court on several occasions,[44] and in *Re O and N (minors); re B (minors)*[45] the House of Lords, while not deciding the point, which had not been fully argued, found "attractive the conclusions of the Court of Appeal in *re M and R*", being of the view that it "would be odd if, on this point, the approach in proceedings for a s 8 order were different from the approach in care proceedings."[46] It is clear, therefore, that in a contested application for a child arrangements order under s. 8 of the Children Act 1989 any future risk of harm to a child in the sense of a real possibility of harm must be underpinned by facts from which such an inference can be drawn.

As to the proof of such facts, the burden is on the party asserting them, which in a civil case must be established on the balance of probabilities, that is by proving a fact to be more probably true than not.[47] There is no room for a court to conclude that something might have happened or might be the case. If a tribunal is left in doubt, the doubt is resolved by concluding that the person who had the burden of proof has failed to discharge it.[48] The law operates a binary system, the effect of which is that an alleged fact not proved is not a fact.[49] However, the failure to find a fact proved on the balance of probabilities does not equate without more to a finding that an allegation is false. In *Re M (Children)*[50] a father was resisting an allegation that he forced his son to watch Jihadist DVDs in order to radicalize him. The judge found the allegation not proved. However, the father wished the judge to go further and declare the allegation to be false, to enable him to cast doubt on the mother's

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[42] [1996] 4 All E.R. 239 at 247. For criticism of the extension of the approach in *In re H* to s. 1(3)(e) to private law cases, see I. Hemingway and C. Williams, "Re M and R; Re H and R" [1997] Fam. Law 740.
[43] *In re H* [1996] A.C. 563 at 591-592.
[44] *Re B (Children) (Care Proceedings: Standard of Proof) (Cafcass Intervening)* [2008] UKHL 35, [2009] A.C. 11; obiter in *Re S-B (Children) (Care Proceedings: Standard of Proof)*, [2009] UKSC 178, [2010] 1 A.C. 678; *Re J (Care Proceedings: Possible Perpetrators)* [2013] UKSC 9, [2013] 1 A.C. 680.
[45] [2003] UKHL 18; [2004] 1 A.C. 523.
[46] [2004] 1 A.C. 523 at [45], per Lord Nicholls, who had delivered the leading opinion in *In re H*.
[47] For a useful summary of established principles, see *Re E (Female Genital Mutilation and Permission to Remove)* [2016] EWHC 1052; [2017] 1 F.L.R. 1255 at [57].
[48] Subject also to any presumption.
[49] See per Lord Hoffmann in *Re B* [2009] A.C. 11 at [2].
[50] [2013] EWCA Civ 388, CA.

credibility on other matters. The Court of Appeal commented that "if a negative is to be proved, that has to be proved with cogent evidence, just as if the positive is to be proved. It is not a correct proposition of law that a rejection of evidence mandates a judge to find that something is false; that is misconceived."[51] The significance for the present analysis of this difference between the failure to prove a positive and the proof of a negative will become apparent later.

In *Re A (A Child),*[52] Sir James Munby P. drew attention to some fundamental points concerning fact-finding which he feared were too often overlooked in child care cases (but which, it is submitted, are equally applicable to private law cases). First, his lordship highlighted the important difference "between an assertion of fact and the evidence needed to prove the assertion"[53] and that it is the latter which is required to factually ground a case; and secondly, the need to demonstrate why the facts justify the conclusion that the child has suffered, or is at risk of suffering harm.[54] A reminder of these points seems particularly pertinent in cases in which there may be assertions that a parental attitude risks harm to a child if contact is ordered. Moreover, while the same approach to fact finding applies to both private law and public law cases, Baroness Hale of Richmond cautioned in *Re B (Children) (Care Proceedings: Standard of Proof) (Cafcass Intervening)*[55] that in a private law case:

> "There are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert local authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false, but it does increase the risk of misinterpretation, exaggeration or downright fabrication."[56]

With this outline of general principles, attention now turns to fact-finding in the case law on contact.

IV. Fact-finding and Inferences as to Risk of Harm in the Case Law on Contact

Few authorities engage with the issue of factual underpinning of a risk of harm in private law contact cases, and those which do exist are hard to reconcile. In *Re H (A Minor)*[57] the Court of Appeal (citing *Re M and R (minors) (sexual abuse: expert evidence)*[58]) confirmed that "the assessment of a given risk to a child in private law proceedings must be based on findings of fact" proved on the balance of probabilities. In *Re H* a judge had ordered supervised contact on the basis of a mother's genuine fear that the father would remove the child from the jurisdiction. This had caused the mother "a great deal of distress and unhappiness", which had been communicated to the child. The mother alleged that during a dispute about the child's late return from a contact visit, the father had said to her "I will make sure you don't see her again" (referring to the daughter). However, this incident had never been the subject of any judicial finding of fact. The Court of Appeal held that the critical issue was the risk of abduction, and the judge had erred in failing to assess whether the mother's fears about

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[51] [2013] EWCA Civ 388 at [17].
[52] [2015] EWFC 11; [2016] 1 F.L.R. 1.
[53] *Re A (A Child)* [2016] 1 F.L.R. 1 at [10].
[54] [2016] 1 F.L.R. 1 at [12].
[55] [2008] UKHL 35, [2009] A.C. 11.
[56] [2009] A.C. 11 at [29].
[57] Transcript CA, 29 January 1998 (unreported).
[58] [1996] 4 All E.R. 239.

unsupervised contact were justified. In so concluding, the Court was clear that the trial judge was plainly wrong when he stated that the test was not whether or not the appellant intended to abduct the child but whether or not the respondent believed that such a threat existed. It was incumbent upon the judge to assess the risk of abduction in order to assess whether the respondent's fears about unsupervised contact were justified.[59] In addition, the court held that the judge was plainly wrong when he failed to make any findings of fact as to whether the appellant threatened to abduct the child and/or failed to assess the risk of such abduction. While disagreeing with the judge's reasoning, the court left the order in place,[60] but also made a family assistance order[61] in the hope that the parties might resolve the tensions between them, and with the possibility that the father could apply to the court to vary the order, if need be.

In *Re M (Contact: Family Assistance: McKenzie Friend)*,[62] in a contact dispute between parents, there was "an issue as to whether or not, as the mother contended, the father had treated her with violence." Without any reference to *Re M and R*, Ward L.J. commented that it is "unnecessary to speculate further on that aspect. It is sufficient to note that the judge was satisfied that the mother's fears were genuinely held."[63] His Lordship added a comment to the father that "whether he likes it or not, *and even whether he deserves it or not*, the fact is that the mother is fearful of his part in the children's life..." (emphasis added). It is not at all clear from the report of this case whether the judge's finding as to the mother's fears were associated with a finding of fact of the father's violence, or indeed whether such findings were ever made. Ward L.J.'s comments above are at least suggestive that the judge's focus may only have been on the mother's claimed anxieties. Certainly, however, the Court of Appeal, in upholding the judge's decision to deny direct contact and make an order for indirect contact only, saw the crucial issue as "the capacity of the mother to be able to cope with the contact taking place in such a way as does not have her anxiety spill over to affect adversely the behaviour of her children."[64]

Applying this approach, it has been held that contact may be restricted by reason of a mother's fears, even where findings of fact have excluded the father as a risk.[65] In *Re A (A Child) (Contact: Sexual Abuse)*[66] the Court of Appeal ordered supervised contact to allay a mother's fears despite a judge's conclusion that alleged sexual abuse of the child had not been perpetrated by the father. In that case the mother appealed a judge's decisions to grant the father visiting contact with his six-year-old daughter at a contact centre, and that a report be prepared on how future contact could be extended to include staying contact. The parents had both been sexually abused during childhood and the mother, a social worker who had worked in child protection, found it difficult to trust the father to play an ordinary fathering role for the reasons given below. When the child was three months old the mother expressed concern that the father had sung to his daughter a popular song with lyrics that the mother perceived as inappropriate: "You're too sexy for your clothes". When the child was aged 10 or 11 months the mother observed her playing with her nipples (which presumably the

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[59] The father had a good job and a house in England and had had ample opportunity to abduct the daughter if he wished since the exits of the contact centre were not manned or secure.
[60] So technically the appeal was dismissed.
[61] Children Act 1989, s. 16.
[62] [1999] 1 F.L.R. 75; [1999] 1 F.C.R. 703.
[63] [1999] 1 F.L.R. 75 at 76.
[64] *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 F.L.R. 75 at 77.
[65] *Re A (A Child) (Contact: Sexual Abuse)* [2002] EWCA Civ 1595; and see *Re H (Children) (Contact Order) (No 2)* [2002] 1 FLR 22; [2001] 3 F.C.R. 385 (denying contact where any risk which a non-resident parent may pose to the child during contact can be eliminated).
[66] [2002] EWCA Civ 1595.

mother perceived as sexualized behaviour). Because of the mother's suspicions, the father withdrew from dressing, bathing and toileting the child when she was about nine months old.

When the girl was about five years old the mother returned home to find her in tights but without knickers. The mother claimed that the girl had said that the father would not allow her to put her knickers on and was touching her bottom. The girl told the mother on other occasions that the father had manipulated her nipples and had touched her private parts. The mother changed the locks of the property and did not permit the father back into the matrimonial home. The father did not deny that the child had said these things, but he strongly denied the allegations of abuse. He was sensitive to how the mother felt and it was agreed that contact should take place with the mother present. This continued for two months until all contact ceased following an argument between the parties about removal of the father's property from the former matrimonial home.

The mother reported the allegations to the police and to social services. An interview carried out in accordance with the Memorandum of Good Practice[67] elicited nothing in the way of an allegation of sexual abuse and no further action was taken. The father applied for contact. A welfare report under s. 7 of the Children Act 1989 recommended supervised contact, recognising the reality of the mother's beliefs, the child's fondness for the father and wish to see him, and that the child had been exposed to an environment highly sensitive to sexual abuse. The evidence also noted that the girl had had 'experiences at nursery school that were novel to her.' The case report does not explain what these were, but one assumes they were experiences which might have some bearing on what the child was saying. After a three-day hearing, the judge said that this was not a case where he simply could not be satisfied that sexual abuse had taken place; he made a positive finding that it had not.

On the mother's appeal, the Court of Appeal substituted an order for supervised contact and indicated that any proposed investigation of the possibility of staying contact was premature. Hale L.J., delivering the leading judgment, with which Mance L.J. agreed, was clear that there was a need for supervised contact for three reasons: (1) the priority in the case was to get some sort of contact going again, and the judge and the section 7 report acknowledged a need to tread with care in making the re-introduction; (2) the fact that a child aged 5 had said these things required caution; and (3) "contact is unlikely to work or be enjoyable for the child or for the father unless the mother feels less anxious about it."[68] Hale L.J. explained:

> "This is a situation in which it is entirely possible for both parties to be right, in the sense that the father did not behave inappropriately with his daughter but the mother retains a real belief that he did based on what her daughter has said. In an ideal world the mother should be prepared to accept the findings of the judge and go along with them. But I recognise that that is often a very difficult thing to do. It leaves out of account all sorts of other factors which will make it difficult for her to do so, above all, her strongly protective view towards her child. It is for those reasons that I accept that there is a need, for the time being, for contact between the father and the child to be supervised in the sense in which I have described it."[69]

As can be seen, the cases do not sit easily together. *Re H (A minor)* correctly requires findings as to whether there is a risk of abduction, but then seems to conclude that the mother's belief must be justified, in the sense of aligning with a finding of risk, i.e., a finding

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[67] *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (Home Office/Department of Health).
[68] *Re A (A Child) (Contact: Sexual Abuse)* [2002] EWCA Civ 1595 at [23].
[69] [2002] EWCA Civ 1595 at [24].

that the father intends to abduct the child. The court does not seem to acknowledge that the mother could hold a genuine fear irrespective of whether there is a risk of abduction (based for example simply on what the father said). By contrast the reasoning in *Re M (Contact: Family Assistance: McKenzie Friend)* is at the other extreme, suggesting that no fact-finding as to risk of domestic violence is necessary provided the mother's fear of contact is genuine. At the very least the Court of Appeal in that case is guilty of not making clear the underlying factual basis of the mother's fear. If the mother's fears were based on the alleged history of domestic abuse (as seems likely), a finding of fact on that is required because, as Wilson J. observed in *Re P (Contact: Discretion)*, if true the mother's fear is "irrelevant: what are relevant are its underlying grounds, which the court adopts";[70] and if the allegations of domestic abuse are not true, that finding casts doubt on the factual foundation for the mother's fear, and thus its genuineness. *Re A (A Child) (Contact: Sexual Abuse)* does not sit well with either of the two cases discussed above, in its continued reliance on the mother's beliefs which are premised on allegations against the father which had been shown not to be true. In so far as that approach implicates the father as a risk to the child, it is not at all easy to square with the Supreme Court's requirement in the context of "possible perpetrator cases", applying the House of Lords' reasoning in *In re H*, that a finding of risk of harm from a parent requires both harm, and identification of the perpetrator of harm, be underpinned by fact.[71]

V. Factual Underpinning in Hostility Cases – An Analysis

Given the difficulties of reconciling the existing case law on the factual underpinning of objections to contact, the rest of this article is concerned to analyse the various situations in which hostility to contact occurs, and to identify the factual foundation for inferences as to risk of harm to a child in such cases. The case law falls into at least three different types.

1. Finding(s) of fact as to past harm (or other worrying facts) with a conclusion that there is a risk of future harm. A classic example is the parent who has been violent and continues to represent a risk of violence to the other parent and/or child. In such a case there is a factual basis for an inference of risk, independent of parental attitude/belief.

2. Finding(s) of fact as to past harm (or other worrying facts) with a finding that there is no on-going risk of such harm, but with a genuine (actual) fear of contact (whether rational or not), which means that the effect on the resident parent of ordering contact will in turn impact negatively on the child's welfare. In this type of case there may have been, for example, severe violence in the past by a perpetrator who is reformed, but nonetheless an ongoing fear of such violence rationally held in light of past events. Cases in which there is a finding of past harm and that a parent's fear is genuine but not rationally held are rare, and there is clearly room for disagreement as to the lack of rationality of the resident parent's fears in

[70] *Re P (Contact: Discretion)* [1998] 2 F.L.R. 696 at 704.

[71] *Re J (Care Proceedings: Possible Perpetrators)* [2013] 1 A.C. 680. For comment, see A. Bainham (2013) 72 C.L.J. 266; S. Gilmore, "*Re J (Care Proceedings: Past Possible Perpetrators in a New Family Unit)* [2013] UKSC 9: Bulwarks and Logic—the blood which runs through the veins of law—but how much will be spilled in future?" [2013] *Child and Family Law Quarterly* 215; M. Hayes, "The Supreme Court's Failure to Protect Vulnerable Children: *Re J (Children)*" [2013] *Family Law* 1015; J. Hayes, "The Judge's Dilemma: *Re J*" [2014] *Family Law* 91.

such cases.[72] In either case, however, there is a factual foundation for the fear, based on the past harm or other worrying past findings of fact.

3. No finding of fact as to alleged harm or other alleged worrying features of a case or, even stronger, a finding that there has been no such alleged behaviour, but nonetheless an ongoing claim of risk of harm to a child from a parent's attitude to contact if ordered.

In each of the first two categories above, it is not difficult to identify at least some factual finding capable of supporting the parent's attitude or belief in relation to contact, which makes the parent's hostility understandable to some extent. The third category is more problematic. Into this last category falls a range of objections to a parent's contact, including the entirely baseless objection,[73] the irrational conclusion based on fact, [74] and the genuine and rational concern based upon disputed allegations or a factual error. [75] In the following discussion it will be argued that in every case, irrespective of the nature of the objection, the court's first task is to ascertain whether the rule in *Re M and R* is fulfilled with respect to the claimed risk of harm to the child. It will be suggested, however, that the nature of the parent's objection may well go to the ease or difficulty of establishing a factual foundation for the risk. It will also be argued that, in cases involving disputed facts, whether a factual foundation for a parental belief can be established may depend on the court's precise findings of fact. The court's second task, in any case in which the *Re M and R* rule is fulfilled, is then to consider whether the parent's attitude or belief represents a justifiable objection to contact.

1. Parental attitude to contact and the rule in Re M and R: establishing a factual foundation for risk

As we have seen, if it is to be said that there is a risk of emotional harm to a child from a parental belief or attitude, the risk cannot be underpinned simply by an assertion or suspicion of the belief or attitude,[76] in the same way that a court may not rely on assertions or suspicions to prove risks of domestic abuse or child abuse. The law requires a chain of inference based on fact before the inference as to risk of harm can properly be made. There must therefore be facts proved on the balance of probabilities from which the conclusion can be drawn that a parent actually holds a particular belief or attitude, from which in turn an inference can be made that the nature of that attitude would represent a serious risk of major emotional harm to the child if contact were ordered.

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[72] See, e.g., *Re L (Contact: Genuine Fear)* [2002] 1 F.L.R. 621 at [42] (mother with phobia of a father who had a past history of violence). Another example might be where a father has threatened to abduct a child from the jurisdiction, but the mother's fears are found by the court not to be rational because of safeguards such as the safe-keeping of the children's passports by a third party.

[73] See, e.g., *Re H (a child) (contact: mother's opposition)* [2001] 1 F.C.R. 59, in which the court could discern no reason for the mother's objection to contact except her own and her family's wish to exclude the father.

[74] By way of a far-fetched example, the mother who objects because the father's hair colour is red; or perhaps, more realistically, because of his sexual orientation, or religious beliefs per se (as opposed to alleged harm arising from religious practices).

[75] Such as the mother in *Re A (A Child) (Contact: Sexual Abuse)* [2002] EWCA Civ 1595 who, according to the court, was acting upon a genuine and rational, but false belief.

[76] In *Re A (A Child) (No 2)* [2011] EWCA Civ 12, [2011] 1 F.L.R. 1817 at [26] Munby P described "the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation" and see, e.g., *A Local Authority v X, Y and Z (Permission to Withdraw)* [2017] EWHC 3741 (Fam), [2018] 2 F.L.R. 1121 (proceedings withdrawn where allegation that children had been radicalised was based on speculation rather than factual foundation).

That is not, of course, to say that a parent's belief must be shown to be true or justified. There is an important difference between the truth of a belief and whether it is actually held. The court is concerned only with the latter and clearly therefore an erroneous belief can be proved to exist. However, while it is important not to equate sincerity with truth or justification, the reasonableness or otherwise of the belief may legitimately be a matter of evidence capable of going to a finding as to whether the belief is actually held; that is, the fact that a belief is baseless in the circumstances could be a basis for a court's inference that the belief has not been proved to its satisfaction to exist.[77] As the Full Court of the Family Court of Australia commented in *Blinko v Blinko*:[78]

> "If the Court does not find that a parent represents such an unacceptable risk of harm, nonetheless it may take into account anxiety on the part of the other parent arising from their genuine, but not necessarily rational, belief that the parent represents such a risk of harm. In such a case, the other parent's belief must be genuinely held. If it is entirely irrational and baseless, then the genuineness of the belief would clearly be open to doubt."[79]

It follows that in a case of unfounded hostility to contact, in which there has been no post-separation contact (and therefore the resident parent's reaction to it, and its impact upon the child, cannot be known) a court may face considerable difficulty identifying facts from which it can infer that a parent holds an implacable hostility to contact which is of such intensity that it risks harm to the child if contact be ordered. It is likely to be difficult, in a case of baseless or irrational opposition, to adduce evidence independent of the belief-holder's mere assertion, or evidence which is not self-serving, that is capable of demonstrating on the balance of probabilities the existence of such a belief or attitude capable of being a major risk of emotional harm to the child. Even in a case in which hostility is proved by reference to the facts, it may be difficult to infer the requisite level of risk. Take for example a mother who "hates" her child's father and is implacably opposed to contact because he had an extra-marital relationship which led to the relationship breakdown. Apart from the extra-marital affair, however, he is an unimpeachable parent and former husband. While there may be some factual foundation for her hostility, it may be difficult for the mother, by reference to those facts alone, to establish on the balance of probabilities that her attitude to contact places the child at serious risk of major emotional harm if contact were ordered, since her hostility to the father does not necessarily evidence that her reaction *to contact*, if ordered, would be such as to cause major emotional harm.

To be clear, the discussion here is not concerned with a parent's behaviour post the making of an order, when an attitude may well translate into defiance of, or emotional reaction to, the order, with a discernible knock-on effect on the child, which then may evidence the attitude concerned and its impact on the child's welfare. The focus here is on the initial stage of deciding whether in principle contact should be ordered. At that stage in a case of unfounded hostility to contact, proving by reference to facts proved on the balance of probabilities that a parent's attitude exists and presents a serious risk of major emotional harm to the child, may

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[77] See by analogy with the approach in the criminal law to dishonesty: "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held." (per Lord Hughes in *Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords (Respondent)* [2017] UKSC 67; [2018] A.C. 391 at [74]).

[78] [2015] FamCAFC 146.

[79] [2015] FamCAFC 146 at [83].

not be easy. Courts should clearly articulate the facts on which they draw such conclusions, in the absence of which there can be no opposition to contact based upon risk to a child from a parent's implacable hostility.

2. Cases in which parental belief is in conflict with the court's findings of fact

Cases which are likely to require a particularly careful analysis of whether the *Re M and R* rule is fulfilled, are those in which any alleged factual foundation for a parent's belief conflicts with the court's finding(s) of fact. Here are some, admittedly extreme, examples. Imagine a mother who has a belief that the father is possessed by evil spirits and might pass on this evil to the child through contact. The father is thus perceived by the mother to be a danger to her and the child, and her attitude to contact places the stability of the mother/child relationship in danger if contact is ordered, with a potentially negative effect on the child's welfare. Within some cultures this example is not so far-fetched. Is the court to proceed on the basis of this genuine (actual) false belief, against the court's inability to find as a matter of fact that the father is so possessed? Indeed, it seems likely that in such a case the court's finding would be even more positively in favour of the father, i.e., a negative finding that he is not possessed.

By way of a similar example, albeit one in which the facts may be more susceptible to objective determination, imagine that the mother believes erroneously that the father has contracted an infectious disease on a recent trip abroad which he will pass on to the mother and child during contact. Despite medical evidence supporting a finding of fact by the court that the father is not infected, the mother genuinely holds to her fears. Again, her reaction to contact if ordered is likely to destabilise the family and impact negatively on the child's welfare. Is the court to proceed on the basis of the mother's erroneous belief in its impact upon the child, in the face of objective reality? The writer's intuition is to think that many readers would think it bizarre for the law to act in the face of reality in favour of such clearly erroneous views in denying a father contact with his child. Perhaps the reason is that these are cases in which on their facts the courts are able with some conviction to hold that the alleged facts are not only not proved, but do not exist at all. In other words, the court is able to say strongly that the allegations are false.

These scenarios have been chosen for their clarity, unencumbered as some cases are by less certainty and more complex and difficult facts. However, while these scenarios provide clear illustrations, in relation to court fact-finding they are no different from any other case in which a belief is found to be erroneous by reference to the court's finding that something has not happened or does not exist. As we have seen, such cases can arise in the context of allegations of sexual abuse where suspicion is not always easily alleviated by findings of fact on the balance of probabilities. But even in the greater uncertainty of the arena of sexual abuse allegations, in the context of the required binary certainty required of court fact-finding, a case such as *Re A (A Child) (Contact: Sexual Abuse)*,[80] discussed earlier, is in principle the same as the scenarios mentioned above. How in principle is such a conflict between fact-finding and parental belief to be resolved?

While the law permits reliance upon a mistaken belief in certain circumstances,[81] it is difficult to think of cases in which the law permits reliance on alleged facts to found a mistaken belief prospectively, after the mistake as to the existence of the facts (and thus the mistaken belief) has been determined by a court to be so and brought to the belief-holder's

[80] [2002] EWCA Civ 1595.

[81] See, e.g., *R v Gould* [1968] 2 Q.B. 65; [1968] 2 W.L.R. 643 (Honest but mistaken and reasonable belief as a defence to bigamy).

attention. The issue has been touched upon in other contexts in family law. In *Synge v Synge*[82] Sir Frances Jeune P. held that a wife's refusal to have sexual intercourse with her husband constituted a reasonable defence to the husband's alleged desertion of the wife within the meaning of the Matrimonial Causes Act 1857. The wife contended that her reason for refusing marital rights to the husband was that he was infected with syphilis and intercourse was therefore unsafe and improper. However, it was proved after a doctor's examination that the husband did not have syphilis. The wife continued, however, to contend that she had believed bona fide that the husband was infected and that her belief justified her refusal of intercourse and destroyed the husband's ground of desertion. The President rejected this contention, commenting:

> "…when the fact can be and, as in this case, has been ascertained, why should the mistaken belief of the wife, even if honest, prevail over the well-founded and equally honest belief of the husband? The primary question to be decided is: Had the husband reasonable ground for desertion? If belief is to be taken into consideration, why should not his honest belief that his wife refused him marital rights without cause justify his conduct even though the wife honestly believed that she had good grounds for such refusal? The solution of the problem presented by such a conflict of beliefs is, I think, to be found in holding that, where the fact can be determined, the fact must prevail, and that erroneous beliefs on either side are immaterial."[83]

In *Everitt v Everitt*,[84] Lord Merriman P. applied this dictum and, importantly, commented that the words of the last sentence above are of general application.[85] In *Allen v Allen*,[86] another divorce case, it was held that even a reasonable but erroneous belief of a fact is extinguished (at least prospectively) upon a finding that the fact cannot be established. Sir Raymond Evershed M.R. commented that otherwise "the position would be that a husband could successfully persist in refusing to discharge the obligations which lie on him as a husband by continuing to assert an honest and reasonable belief (in the sense of its being a belief that is sensible and not the result of caprice or stubborn and distorted judgment) in the proposition that his wife is an adulteress, a proposition which he has been, and continues to be, quite unable to prove in a court of law."[87]

On the strength of the authorities discussed above, any factual foundation for a parent's belief is extinguished, at least prospectively, by the court's complete negation of that factual foundation by its findings of fact to the contrary. As Lord Merriman P. observed, that is a principle of general application and there does not appear to be any reason not to apply it to children cases simply because, as it might be said, those cases involve the welfare of a child and are therefore different. We are here considering the earlier stage of identifying the facts from which the court should proceed to consider the issue of the child's welfare.[88] There is no justifiable difference in principle at the fact-finding stage. It must follow that in a case like *Re A* discussed above, in which there are competing parental beliefs as to whether the father has sexually abused the child, one supported by the court's finding of fact and the other not, the solution, as Sir Frances Jeune P. observed, must be to resolve the competing views by

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[82] [1900] P. 180, as approved by the Court of Appeal at [1901] P. 317.
[83] *Synge v Synge* [1900] P. 180 at 197.
[84] [1949] P. 374 at 380; [1949] 1 All E.R. 908 at 912.
[85] For a similar view, see *Wood v Wood* [1947] P. 103; [1947] 2 All E.R. 95, Lord Merriman P.
[86] [1951] 1 All E.R. 724.
[87] [1951] 1 All E.R. 724 at 731.
[88] Children cases of course differ from divorce cases in that the court, having ascertained the facts, has a discretion, applying s. 1(1) of the Children Act 1989 to the facts, but that does not affect the point of principle at the fact-finding stage.

reference to determined fact, which must prevail, any erroneous beliefs on either side being immaterial. That approach, however, does not sit easily, or at all, with some of the reasoning in *Re A.*

One senses that, while the court in *Re A* acknowledged that the judge was entitled to make the finding he had, it remained uneasy with the degree of certainty with which the judge approached his findings on the allegations, given the acceptance by the father that the child's allegations had been uttered. Otherwise, why would the Court of Appeal have felt it necessary to mention the child's allegations remained a matter of concern in the proceedings? One can of course have some sympathy with that unease. As Thorpe L.J. observed on the permission to appeal hearing in the case, if no abuse had taken place, why, as the father did not dispute, had the child said these things? This question hints at concern that the evidence may have been sufficient to support a conclusion that a finding of abuse had not been made out, but that the judge may have been on less solid ground in holding positively that there had been no abuse.

A comment of Hale L.J., however, may indicate that the Court of Appeal did not have that distinction in mind when considering the ongoing significance of the mother's beliefs. Her ladyship observed:

> "It was, of course, for the judge to draw his conclusions as to the facts, and, again, on the material before us, he was certainly entitled to reach the conclusion that he did. Whether this is expressed as being satisfied that no abuse took place or not satisfied that it had taken place makes no difference as far as the law is concerned; they both amount to a finding that there has been no abuse."[89]

With respect, as discussed earlier, there *is* a difference between the inability to find a fact, and a positive (or negative) finding that something has actually not happened. It does not therefore make no difference as far as the law is concerned as Hale L.J. contends. A finding that something has not happened is to find that the content of the allegation that it happened is also false. If that conclusion is reached after considering all of the evidence, including any statements alleging or suggesting abuse, the court has no room for future reliance on such statements to found a parent's belief in any risk to the child from the other parent. By contrast, if a judge has simply found that the evidence does not support a finding of abuse on the balance of probabilities, that does not mean that the allegations are false; it just means that the evidence was not sufficient to prove the case. It is submitted that in such a case it should be open to a judge to continue to rely, for example, on a child's statements as a factual foundation for the mother's belief that the child has been abused (if the fact that the statements were made is proved or admitted), although even that conclusion does not sit easily with the dictum from *Allen v Allen* cited earlier. However, it is surely not possible for the court to do so in a case like *Re A*, when the parent has been exonerated of any abuse by the court.

Yet part of the reasoning that led Hale L.J. to put in place a supervised contact order was that "it must be of concern that a child who at the time was not yet five was saying these things, whether for the reasons given by the judge to do with the somewhat unusual and isolated nature of her family life and the atmosphere for whatever reason in the home, or whether for some other reason." The first instance judge was clear, however, in his finding that the reason was not that the girl had been abused by her father, so it must surely also be a matter of concern, and surprise, that the Court of Appeal persisted in linking the child's statements to the need for supervised contact with the father. It is instructive to consider the

[89] *Re A (A Child) (Contact: Sexual Abuse)* [2002] EWCA Civ 1595 at [21].

courts' likely approach if the finding and belief were reversed, that is, a father has been found to have sexually abused his child, but the mother does not believe that he has, because the child has said that he has not and she trusts the father. It seems unlikely that a court would acknowledge the mother's beliefs as a justification for not putting in place supervised contact.

It will be recalled that Hale L.J. also commented that this "is a situation in which it is entirely possible for both parties to be right, in the sense that the father did not behave inappropriately with his daughter but the mother retains a real belief that he did based on what her daughter has said." To say that it is possible for each parent to be right in particular senses, is to distract from the central issue which is whether, in light of the judge's finding of fact, there could be legitimate continued reliance by the mother on a belief which was contrary to that finding. While the mother may have difficulty accepting the court's finding, there is no reason why the appellate court should not accept the consequences of its own upholding of the judge's finding. There seems little point in making a finding of fact if the court is to ignore it and permit the mother's contrary belief to hold sway in any event. It might be said that there can then be a weighing up of the facts as found and the fact that the mother refuses to accept the court's finding. However, the mother's refusal to accept the court's finding is irrelevant to whether the father represents a risk of harm to the child and, as argued above, the mother's attitude, in so far as it represents a risk if contact be ordered, has no factual foundation given the court's finding.

The question is not, therefore, whether the mother refuses to accept the court's finding and retains a real belief, but whether in light of the court's finding the court should in principle take account of that erroneous belief in its disposal. Case law suggests that a party's belief should be extinguished prospectively upon a court's finding of fact to the contrary. To persist in recognition of the belief in such circumstances would be for the law to accept wilful blindness to the facts as found by the court, or alternatively must suggest that the parent holding that mistaken view is genuinely delusional, for example because of a psychiatric illness. Those conclusions in any event raise other issues as to the child's welfare, such as whether it is truly in the welfare of children to be brought up by a parent whose beliefs are delusional or dictated by wilful blindness to the facts.

To be clear, the criticism of *Re A* is not that the court put in place a temporary regime of supervised contact; there were some valid reasons for doing so irrespective of the court's finding of fact on the sexual abuse issue, in order to smooth the rehabilitation of the father/child relationship. The criticism is with those parts of the reasoning which might suggest that the mother's belief and what the child had said, continued to have some validity in respect of the propriety of the father's unsupervised contact with the child. It is submitted that the court should have avoided saying that the mother could still be "right", in the face of the court's finding of fact, and that *in these proceedings in relation to the father's contact* it was still a matter of concern that the girl had said what she said.

A danger of accepting a mere belief in the face of a contrary factual finding was highlighted, at the level of policy, in a different context by the House of Lords in *Williams v Beesley*.[90] In that case the plaintiff, who was suing a solicitor, wished a jury trial rather than before a single judge as he believed that the legal profession would be biased against him and towards the solicitor. The House of Lords commented that to "allow the court's decision…to be swayed by the existence of such a belief by one of the parties, however sincerely it might be held, would be to acknowledge that there was some substance in it and that our system of justice lacks the firm foundation of an impartial judiciary."[91] In the child law context it is a

[90] [1973] 1 W.L.R. 1295; [1973] 3 All E.R. 144.
[91] [1973] 1 W.L.R. 1295 at 1299.

reminder that if a court is minded to deny or restrict contact in circumstances where the applicant for contact has been found not to be a risk of harm to the child, any disposal by the court should be framed in such a way as to make that clear and not create any other impression that there is any substance in the allegations that have been made against the applicant.

3. Hostility which is factually underpinned but not justified

Once the risk from a parent's hostility to contact has been proved to exist by reference to facts proved on the balance of probabilities, the court's next task is "to carry out an evaluation of whether the primary carer's rooted opposition is with or without objective foundation",[92] that is whether it is rationally connected or not to the other parent's suitability to have contact. Where there is an objective foundation, the court's job is "to balance the justified objection against all other considerations relevant to the performance of its duties under s 1 of the Children Act 1989" and only if the balance tips in favour of contact will an order be made.

In cases of unjustified implacable hostility to contact, including those in which resistance to contact is manifested through one parent alienating the other parent from the child,[93] judges tend only to "capitulate" to the hostility when it is clear that pursuing contact will do more harm than good. In testing whether that stage is reached, the courts have sometimes adopted a robust stance, employing enforcement strategies such as a change of the child's residence or a threat thereof,[94] or in extreme cases the making of an interim care order.[95] Parental alienation has been perceived as harmful to the child (as illustrated in the quotation from the judgment of McFarlane L.J. in *Re J* at the beginning of this article), and practitioners have called for the swift use of legal and, where appropriate, therapeutic interventions,[96] although the difficulties such cases present can never be underestimated.

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[92] *Re H (a child) (contact: mother's opposition)* [2001] 1 F.C.R. 59 at [32].

[93] J. B. Kelly and J. R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 *Family Court Review* 249 at 251 described such a child as: "one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent." Distinguishing normal child reactions to parental separation from alienation, and the management of the latter, requires care: see C. S. Bruch, "Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases" [2002] *Child and Family Law Quarterly* 381 and H. Clarkson and D. Clarkson, "Confusion and controversy in parental alienation" (2007) 29(3/4) *Journal of Social Welfare and Family Law* 265-275. For an overview, see J. Doughty, N. Maxwell and T. Slater, *Review of research and case law on parental alienation* (Cardiff University, commissioned by Cafcass Cymru, April 2018).

[94] See, for examples, *V v V (Children) (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 F.L.R. 851; *Re A (Suspended Residence Order)* [2009] EWHC 1576 (Fam), [2010] 1 F.L.R. 1679 upheld in *Re D (Children*) [2009] EWCA Civ 1551; *Re M (Contact*) [2012] EWHC 1948 (Fam), [2013] 1 F.L.R. 140; *Re S (Transfer of Residence)* [2010] EWHC 192 (Fam); [2010] 1 F.L.R. 178; *Re B (change of residence; parental alienation)* [2017] EWFC B24, and for comment, C. Molyneux and C. Gilham, "From Parental Alienation to Parental Co-ordination: A Discussion of B (Change of Residence; Parental Alienation)' [2017] EWFC B24" (2017) 5 *Private Client Business* 160-169.

[95] *Re M (Intractable Contact Dispute: Interim Care Orders)* [2003] EWHC 1024 (Fam) [2003] 2 F.L.R. 636.

[96] D. Eaton Q.C., S. Jarmain, L. Fabian Lustigman 'Parental alienation: surely the time has come to effect change?' [2016] Fam Law 581. See the Special Issue on 'Alienated Children in Divorce and Separation: Emerging Approaches for Families and the Court' (2010) 48 (1) *Family Court Review*; H. Zeitlin, 'Acrimonious Contact Disputes and So Called Parental Alienation Syndrome: a Model of Understanding to Assist With Resolution' (2007) 75(4) *Medico-Legal Journal* 143; D. Clarkson and H. Clarkson, "The unbreakable chain under pressure: the management of post-separation parental rejection" (2006) 28(3/4) *Journal of Social Welfare and Family Law* 251-266.

Eventually, despite all efforts, it may be necessary in the child's interests to acknowledge the harm hostility would cause if contact were ordered.

It is interesting to note, however, that this is not how the Court of Appeal has characterised this end point. In *Re O (Contact: Imposition of Conditions)*[97] Sir Thomas Bingham M.R., when discussing implacable hostility, talks of judging whether *contact will injure* a child, and Hale J. in *Re D (Contact: Reasons for Refusal)*,[98] similarly refers to reaching "the conclusion that *contact will be harmful* to the child" (emphasis added). This raises a subtle but important point about how cases involving implacably hostile parents are characterised or described by the courts. Should the harm to the child be characterised as resulting from the non-resident parent's contact, or from the resident parent's hostility?

An emphasis on the harmfulness of the non-resident parent's *contact* immediately raises the question of the relevance to contact proceedings of the resident parent's unfounded hostility. On a contact application the court is not determining the child's welfare at large. Its focus is on whether the non-resident parent's application for contact should be granted having regard to the welfare of the child. By s. 1(2A) of the Children Act 1989[99] a parent's involvement in the child's life will be presumed to further the child's welfare, unless the contrary is shown.[100] In a case of unfounded hostility to contact, the problem of relevance of the hostility to the parent's application for contact lies in the fact that there is no link between the applicant parent and the harm to the child that is being claimed as a justification for denying contact. The harm is not a product of the nature or quality of the potential contact, nor has the applicant parent any justifiable causative role in the resident parent's attitude *to contact* and its impact upon the child. It is clear in such cases that, but for the resident parent's unjustifiable attitude, contact could proceed without harm to the child. The cause of harm to the child is the knock-on effect of the resident parent's hostility. It has not therefore in such cases been shown to the contrary that the *non-resident parent's involvement* will not further the child's welfare. That parent's involvement will further the child's welfare, but the resident parent's unrelated and unjustified attitude to the same will result in harm.

It is submitted therefore that the courts should not countenance the emotional impact upon children of unjustified parental attitudes as a *justification* for denying another parent contact *on the basis that the contact will be harmful*. There should be no room in a case of unjustified hostility to contact for a resident parent to claim that the court decided that the non-resident parent's contact with the child would be harmful. No one would ever claim that a resident parent's hostility to contact manifested through alienation of a child should result in the characterisation of the other parent's contact as harmful. Yet the resultant unjustified impedance of contact is the same irrespective of whether it is manifested through the parent's direct objections or indirectly via the inauthentic views of the alienated child; and such parental behaviour may be similarly worrying. Indeed, in *Re H (a child) (contact: mother's opposition)*[101] Thorpe L.J., with whom Dame Elizabeth Butler-Sloss P. agreed, commented that where a rooted opposition is without objective foundation, "it may well be indicative of a

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[97] [1995] 2 F.L.R. 224, CA.

[98] [1997] 2 F.L.R. 48, CA.

[99] Section 1(2A) applies unless the parent cannot be involved in the child's life in any way without risk of harm, so will apply in most cases (see s. 1(6)).

[100] For the view that the intention behind this provision is not to introduce a persuasive presumption, see F. Kaganas, "Parental involvement: a discretionary presumption" (2018) 38(4) *Legal Studies* 549-570. Cf. A. Bainham and S. Gilmore, "The English Children and Families Act 2014" **(**2015) 46(3) *Victoria University of Wellington Law Review* 627, at 632-633, who argue that the ordinary signification of the words of the statute supports a persuasive presumption.

[101] [2001] 1 F.C.R. 59. The mother sought to "blackmail" the court by saying that if the father had contact she would not have the child back.

disordered personality or at least disordered emotions leading to disordered thinking"[102] and that it might "be dangerous to assume that such disordered states manifest themselves only in relation to the father and to contact. There may well be other areas of parental care and responsibility which are equally affected."[103] The Court of Appeal suggested that, in the same way as a non-resident parent with a propensity to violence might be ordered to seek treatment, a court should consider adopting the same approach where the disordered behaviour lies in the resident parent.[104] Clearly this case supports the view that in such cases harm is attributable to the parent who is resisting contact.

It is submitted that unjustified hostility to contact, however manifested, should never be permitted to result in characterisation of a non-resident parent's contact as harmful, and should never be perceived in that sense as a justification for denying that parent contact. The courts should be clear about what is happening in such cases: contact which would otherwise be of benefit to the child's welfare cannot take place because if it does the resident parent's unjustified attitude will result in harm to the child. The only circumstances in which that state of affairs should be declared by a court is when that harm outweighs the benefit of contact; no alternative care arrangements are possible as a means of ensuring contact free from harm; and when all efforts for promoting contact consistent with the child's welfare have been exhausted.

VI. Conclusion

A resident parent's hostility to a child's contact with the non-resident parent post-separation arises in broadly three categories of case: (1) where there is a risk of harm to the child independent of the hostility; (2) where there is no independent risk of harm but a genuine and justifiable fear of contact; and (3) in cases of unfounded hostility, in which there is no good reason for the hostility, whether by reason of a completely baseless objection, an irrational conclusion based on fact, or a genuine and rational concern based upon a factual error. English law permits unfounded hostility to thwart the child's contact with the non-resident parent only when the resident parent's attitude would place the child at serious risk of major emotional harm if contact were ordered. In all categories of case, fact-finding is a crucial component of justice to ensure that a parent is not erroneously labelled as harmful in cases of unjustifiable hostility, and that a parent who has justifiable fears is not erroneously labelled as unjustifiably hostile. It is also an essential foundation for accurate identification of where the child's welfare lies.

All children cases are subject to the rule that any inference as to risk of harm to a child must be founded upon facts proved on the balance of probabilities (the rule in *Re M and R*). However, while this is a principle familiar to family court judges, it may be that they are less attuned to applying it in respect of the risk of emotional harm to children from parental beliefs/attitudes. Certainly, the Court of Appeal's engagement with this issue to date has been sketchy, lacks clarity and is arguably contradictory.

This article has sought to highlight that the rule in *Re M and R* applies to any parental belief or attitude which is said to risk harm to child. In cases of 'unfounded hostility' to contact, identifying facts which underpin the existence of the parent's attitude and demonstrate a serious risk of major emotional harm if contact be ordered, may be no easy

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[102] [2001] 1 F.C.R. 59 at [33].

[103] *Re H (a child) (contact: mother's opposition)* [2001] 1 F.C.R. 59 at [34]. See also H.H.J. Bellamy's comment in *Re AB (a child) (contact orders: fact-finding hearing)* [2016] EWHC 3115 (Fam), at [110], that a mother's "apparent implacable hostility to the recommencement and development of a meaningful relationship between AB and his father raises doubts about her ability to meet all of AB's emotional needs".

[104] *Re H (a child) (contact: mother's opposition)* [2001] 1 F.C.R. 59, [34].

task, particularly at the court's initial stage of deciding whether in principle contact should be ordered. While there is no requirement that the attitude or belief be reasonable or rational, its reasonableness or otherwise in the circumstances of the case is a matter of evidence going to whether it is actually held. Where the attitude/belief is irrational and baseless a court might well be entitled to conclude that the genuineness (actuality) of the attitude/belief is open to doubt. In cases of unfounded hostility, courts should clearly articulate the facts on which they draw the conclusion that a parent's attitude places the child at serious risk of major emotional harm. If there is no factual foundation for such attitude, there can be no inference of such risk to the child's welfare therefrom.

Cases which are likely to require a particularly careful analysis of whether the *Re M and R* rule is fulfilled are those in which parental belief conflicts with the court's findings of fact. Analysis of case law suggests that a principle of general application is that, at least prospectively, the court's finding of fact must prevail over erroneous beliefs which contradict that finding. It follows that, in a case in which a court has made a positive finding that a child has not been abused by a parent, there is no scope for the factual foundation of a parent's belief to the contrary. On the other hand, if the court's finding is merely that the abuse has not been proved, allegations of abuse have not been completely extinguished by the court's finding of fact, and there may still be scope to found such belief upon statements or allegations which have been proved.

In cases in which hostility has a factual foundation but is unjustified, in the sense of having no relevant connection to the non-resident parent's suitability to have contact, without more it cannot be shown, within the meaning of s. 1(2A) of the Children Act 1989, that the non-resident parent's involvement will not further the child's welfare. Accordingly, in such cases the courts should only deny contact as a last resort, and never describe the non-resident parent's contact as 'harmful'. Rather, they should be clear about what is happening: contact which would otherwise be of benefit to the child's welfare cannot take place because, if it does, the resident parent's unjustified attitude will result in harm to the child.